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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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No. 32

JAMES R. HOFFA, *Petitioner*

v.

UNITED STATES

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No. 33

THOMAS EWING PARKS, *Petitioner*

v.

UNITED STATES

---

No. 34

LARRY CAMPBELL, *Petitioner*

v.

UNITED STATES

---

No. 35

EWING KING, *Petitioner*

v.

UNITED STATES

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## PETITION FOR REHEARING

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Petitioners respectfully petition the Court to set aside the opinion and judgments rendered herein on December 12, 1966, and to grant them a rehearing for the following reasons:

I.

**Under the Supervisory Powers of This Court, Partin's Testimony Should Have Been Held Inadmissible. Petitioners Should Be Granted a Rehearing So That This Question May Be Briefed and Argued.**

1. The writs of certiorari granted by the Court in these cases were limited to the following question:

> "Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of the defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge."

Consequently, the briefs and arguments were confined to the constitutional issues presented by this question.

The Chief Justice, in his dissenting opinion, held that Partin's testimony should have been excluded under the supervisory powers of this Court. The majority opinion does not touch this issue. Nor was this issue briefed or argued by the parties. It is a substantial ground for reversal, presenting many considerations not heretofore briefed and argued, which should be decided by this Court after full briefing.

2. On two occasions this Court has reversed cases under its supervisory powers because the character of key Government witnesses was such as to make their testimony necessarily untrustworthy. *Communist Party* v. *Subversive Activities Control Board,* 351 U.S. 115; *Mesarosh* v. *United States,* 352 U.S. 1. For this

reason, among others, the Chief Justice thought Partin's testimony should have been excluded.[1]

3. This Court, under its supervisory powers, has also held inadmissible evidence which was obtained by Government agents in "wilful disobedience of law." *McNabb* v. *United States,* 318 U.S. 332, 345. See also *Mallory* v. *United States,* 354 U.S. 449, 453; *Upshaw* v. *United States,* 335 U.S. 410. The majority opinion recognized that Partin's conduct as a Government agent was "presumptively" in violation of petitioner Hoffa's Sixth Amendment rights.

4. In addition, this Court should review, after full briefing, the question of whether its supervisory power should be exercised in this case to prevent the Government from hereafter intruding into the private councils and defense preparations of persons charged with crime.

Many recent decisions of this Court have ruled over and over again that the right to assistance of counsel under the Sixth Amendment can in nowise be compro-

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[1] Not only did the trial court erroneously refuse to give a particular cautionary instruction as to the testimony of informer-agent Partin [(App. 251a-255a, 258a, 261a-265a, 274a) *United States* v. *Masino,* 275 F. 2d 129, 133 (2 Cir., 1960); *Fletcher* v. *United States,* 158 F. 2d 321, 322 (D.C. Cir., 1946)], but compounded this error by instructing the jury at the Government's request and over appellants' objection, that a witness is *presumed* to testify truthfully. (App. 3164a-3165a, 3183a).

On December 30, 1966, the Third Circuit Court of Appeals, in conflict with the decision below (349 F. 2d at 52-53), held that it was error to give the same instruction, i.e., that a witness is presumed to speak the truth. *United States* v. *Meisch,* 3 Cir., ——F. 2d ——, 35 L.W. 2382 (Doc. No. 15492, 12/30/66). That Court held that such an instruction "in addition to derogating from the jury's sole right to determine the credibility of witnesses . . . ," also "conflicts with the presumption of innocence of a defendant." (Slip opinion, pp. 7-8).

mised.[2] That right is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States,* 315 U.S. 60, 76 (1942). Our experiences as lawyers and adversaries in the trial courts, as well as common sense and justice, teach that any inroad upon this fundamental predicate of our system of justice will destroy it. Yet the majority decision now makes it possible for the Government to carry on with impunity intrusions into the constitutional right to counsel heretofore zealously guarded.

Like wiretapping,[3] intrusions by the Government into the right to counsel are likely to remain secret and unknown to the defendant unless the Government chooses to disclose them. The chances are that only when an attempt is made to use the intruder's testimony in a subsequent trial, as in this case, will the intrusion ever become known to the defendant. Thus, the Government is safe in any such intrusion. For it may place an informant in its adversary's councils with the realization that it probably never will become known, and be secure in the thought that if the intrusion does become known, it can justify the intrusion under the holding of this case. As a result, lawyers and defendants hereafter must prepare and engage in trial under the constant fear that their actions are watched and reported to their adversary. Suspicions

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[2] See e.g. *Escobedo* v. *Illinois,* 378 U.S. 478 (1964); *Massiah* v. *United States,* 377 U.S. 201 (1964); *White* v. *Maryland,* 373 U.S. 59 (1963); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Douglas* v. *California,* 372 U.S. 353 (1963); *Hamilton* v. *Alabama,* 368 U.S. 52 (1961).

[3] Recent disclosures of extensive wiretapping by Government agencies show that the constitutional rights of persons suspected of crime cannot be trusted to the good faith of Government agents.

will mount. Espionage and counter-espionage will increase. Defendants will not dare prepare and engage in trial without their own agents surrounding them and guarding them against intrusion by their adversary, the Government. Communications between attorney and client will decrease. Justice will suffer and our system of adversary litigation will degenerate.

We submit that there is only one means by which this Court can resolutely set its face against intrusions into the right of an accused to prepare his defense without being watched by the Government. Here, as in other instances of lawless governmental conduct, the exclusionary rule is necessary "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U.S. 206, 217 (1960). The only possible deterrent to such intolerable conduct will be for the Government to know that it cannot use any evidence obtained by such intrusion for any purpose at all. Only by making the Government's intrusion completely futile will it be stopped.

5. For the foregoing reasons, this Court ought to review, after full briefing and argument, the issue of whether Partin's testimony should be held inadmissible under the supervisory powers of this Court.

## II.

### Partin's Testimony Should Have Been Held Inadmissible Under the Fourth and Sixth Amendments.

1. *Fourth Amendment.*—As the majority opinion notes, a man in "his home or his office" is protected by the Fourth Amendment "from unwarranted governmental intrusion" whether such intrusion be "guile-

ful" or "forcible." 17 L. Ed. 2d 374, 381. If that well-settled interpretation of the Fourth Amendment means anything, it must mean that, except in special circumstances not present in this case, a Government agent cannot legally enter a man's home to help the Government's prosecution of that man unless he has a valid search warrant or the man's consent to such entry. Here, Partin, as a Government agent, repeatedly entered petitioner Hoffa's suite for the very purpose of getting evidence against him. Partin had no search warrant. And under all of the decisions (see Brief for Petitioners, pp. 35-38) there was no effective consent to such entries by Government agent Partin, because Partin, unlike the Government agent in *Lopez* v. *United States,* 373 U.S. 427, effectively concealed the fact of his being the Government's agent. All of Partin's entries were, therefore, violations of the Fourth Amendment. So much seems indisputable. The question for decision is whether Partin's testimony of alleged admissions was the product of his Fourth Amendment violations. Since those alleged admissions were the very objective sought by his violations, they were clearly the product of those violations.

The majority opinion does not meet, but avoids the foregoing analysis. It relies on *Lopez,* where there was effective consent to the entries of the Government agent because the Government agent was identified as such. It relies on the fact that Partin got some of his alleged admissions in areas not protected by the Fourth Amendment. So proceeding, the majority opinion concludes that there is no Fourth Amendment protection against eventuation of the risk that a friend will reveal a man's confidences to the Government. But, with all deference, that conclusion does not dispose of this case. Here, many of Partin's claimed admissions

by Hoffa were obtained in the course of Partin's illegal entries into petitioner Hoffa's suite. As to those alleged admissions, the fundamental risk which petitioner Hoffa ran was, not that a friend would reveal confidences, but that there would be a secret police officer in his home to look for evidence. The very center of the Fourth Amendment protects a man against the eventuation of that risk.

2. *Sixth Amendment.*—The majority opinion assumes, in accordance with our argument on the merits, that Partin violated the Sixth Amendment rights of petitioner Hoffa to the assistance of counsel in his Test Fleet defense. However, the majority feels that it "would be both unprecedented and irrational" to prohibit the Government's use in another proceeding of the evidence obtained by such Sixth Amendment violation. 17 L. Ed. 2d 374, 385. The prohibition of the Government's use of such evidence is "unprecedented" because the question has not heretofore arisen. But as to its being "irrational," the whole course of this Court's decisions under the Fourth Amendment (see Brief for Petitioners, p. 50) provides rational and relevant precedent for prohibiting the Government's use of evidence obtained by violation of the Constitution. Unless the Court is to distinguish between the Fourth and Sixth Amendments, for which distinction there appears to be no rational basis, the Government must be prohibited from use in any proceeding of evidence obtained by violation of the Sixth Amendment, just as in Fourth Amendment violations.

Finally, the majority's holding that Partin's testimony of alleged admissions was not the product of his violation of the Sixth Amendment overlooks the essential fact that Partin's objective in such Sixth Amendment violation was to obtain precisely such admissions.

## III.

**Since Constitutional Issues Were Raised by Petitioners on the Question of the Admissibility of Partin's Testimony, Justices Douglas and Clark Erroneously Held That This Court Was Bound by the Findings of the Courts Below. Since the Views of Those Justices on the Merits of the Case May Affect Disposition of This Case on Rehearing, Petitioners Should Be Afforded the Opportunity To Brief and Argue the Question of the Lower Court's Findings.**

The District Court had found that the Government had not placed Partin in petitioner Hoffa's midst. The Court of Appeals approved that finding. Justices Clark and Douglas, without the benefit of briefing and argument by the parties, concluded that this Court must defer to the findings of the courts below, as not "clearly erroneous." We submit that this legal conclusion is wrong, as are the findings of the lower courts. Petitioners should be afforded the opportunity to brief and argue these issues.

This Court has often made its own independent examination of the record and made factual findings contrary to those of the lower courts in instances *where there is a claim of denial of Federal constitutional guaranties. Jacobellis* v. *Ohio,* 378 U.S. 184, 187-188 (1964); *Haynes* v. *Washington,* 373 U.S. 503, 515-516 (1963); *Napue* v. *Illinois,* 360 U.S. 264, 271-272 (1959); *Watts* v. *Indiana,* 338 U.S. 49, 51 (1949); *Hooven & Allison* v. *Evatt,* 324 U.S. 652, 659 (1945); *Norris* v. *Alabama,* 294 U.S. 587, 590 (1935).[4]

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[4] See the dissenting opinion of the Chief Justice. Further authority for the practice of this Court in making its own independent examination of the record when a denial of rights under the Federal Constitution is alleged may be found in: *Spano* v. *New York,* 360 U.S. 315, 316 (1959); *Thomas* v. *Arizona,* 356 U.S. 390, 393 (1958); *Payne* v. *Arkansas,* 356 U.S. 560, 562 (1958); *Leyra* v. *Denno,* 347 U.S. 556, 558 (1954); *Kern-Limerick, Inc.* v. *Scur-*

*Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, relied on by Mr. Justice Clark did not involve a denial of rights under the Federal Constitution. Indeed, *Graver* was a civil suit for patent infringement. This Court was, of course, compelled to apply Rule 52(a), F. R. Civil P., which provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

It is true that most of the cases where this Court has made its own findings are state cases. But no different rule should apply where the conviction in a Federal criminal case is challenged on a claim of deprivation of rights under the Fourth, Fifth and Sixth Amendments. Indeed, there is more reason for this Court to make its own determination of facts where it is claimed that conduct of Federal agents has infringed on precious rights guaranteed to the individual by the Federal Constitution. Surely this Court cannot permit erroneous findings of lower courts to preclude it from affording effective review, and de-

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*lock*, 347 U.S. 110, 121 (1954); *Avery* v. *Georgia*, 345 U.S. 559, 561 (1953); *Feiner* v. *New York*, 340 U.S. 315, 322-323, note 4 (dissenting opinion) (1951); *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951); *Cassell* v. *Texas*, 339 U.S. 282, 283 (1950); *Haley* v. *Ohio*, 332 U.S. 596, 599 (1948); *Malinski* v. *New York*, 324 U.S. 401, 404 (1945); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 147-148 (1944); *Ward* v. *Texas*, 316 U.S. 547, 550 (1942); *Smith* v. *Texas*, 311 U.S. 128, 130 (1940); *South Carolina* v. *Bailey*, 289 U.S. 412, 420 (1933); *Roth* v. *United States*, 354 U.S. 476, 497 (dissenting opinion) (1957); *Stroble* v. *California*, 343 U.S. 181, 190 (1952); *Sterling* v. *Constantin*, 287 U.S. 378, 398 (1932).

termining whether the Government's alleged misconduct is violative of basic constitutional safeguards.

Petitioners should be afforded a rehearing on this question which has not been previously briefed or argued, and upon which the Court is divided.

## IV.

### The Court Should Grant the Relief Requested in Petitioners' "Motion for Relief Because of Government Wiretapping, Electronic Eavesdropping and Other Intrusions."

On January 26, 1967, petitioners filed with this Court a "Motion for Relief Because of Government Wiretapping, Electronic Eavesdropping and Other Intrusions." It is respectfully submitted that this Court should grant this Petition for Rehearing for the facts and reasons stated therein.

## V.

### Petitioners Request Participation of All Justices of the Court in Considering the Petition.

Because of the importance of the issues presented in this case, petitioners respectfully urge participation by all Justices of the Court in consideration of this petition. Petitioners waive any suggestion of prejudice to them by participation of either of the Justices who have heretofore disqualified themselves in this case.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that: (1) all Justices of the Court should participate in the disposition of this Petition; (2) disposition of this Petition should await the Court's ruling on petitioner's "Motion for Relief Because of Govern-

ment Wiretapping, Electronic Eavesdropping and Other Intrusions" filed January 26, 1967; (3) this Petition for Rehearing be granted; and (4) upon such rehearing, the judgments below be reversed.

Respectfully submitted,

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The undersigned counsel respectfully represents in behalf of all petitioners that the foregoing Petition for Rehearing is filed in good faith and not for purposes of delay.

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